

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

San Antonio, Texas

JB I ELECTRICAL SYSTEMS, INC.

Employer

and

Case No. 16-RC-10592

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS,  
LOCAL 60

Petitioner

**DECISION AND DIRECTION OF ELECTION**

The Petitioner, International Brotherhood of Electrical Workers, Local 60, filed a petition under Section 9(c) of the National Labor Relations Act seeking a unit of all journeyman, apprentice, and helper electricians employed in Bexar County, Texas, and excluding all guards, office and clerical employees, and supervisors as defined in the Act. The Petitioner also seeks to exclude three of the Employer's electricians sent from Fort Worth, Texas to Bexar County as temporary employees.

The Employer, JBI Electrical Systems, Inc., agrees with the Petitioner that the designations journeyman, apprentice, and helper electricians is an appropriate designation of all classifications. However, the Employer argues that the petition should be dismissed. The Employer contends that because of its fluctuating workforce, the petition should be dismissed because it will not have a representative complement of employees at the time of election. Alternatively, the Employer seeks either an order limiting representation to its three current Bexar County jobs or an order abating the election until

the Employer learns the fate of a pending Bexar County job bid. A hearing officer of the National Labor Relations Board conducted a hearing on this matter and both parties filed briefs with me.

## **REGIONAL DIRECTOR'S FINDINGS**

I have considered the evidence and arguments presented by the parties. I conclude that an immediate election should occur and that the appropriate unit is all journeyman, apprentice, and helper electricians employed in Bexar County, subject to the eligibility requirements set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) as modified at 167 NLRB 1078 (1967), and *Steiny and Co.*, 308 NLRB 1323, 1324 (1992). Regarding the three Fort Worth electricians, I find they are not temporary employees and are eligible to vote if they meet the *Steiny/Daniel* criteria.

## **STATEMENT OF FACTS**

The Employer is an electrical contractor conducting business in Texas and other states. Its main office is in Fort Worth, Texas, with additional offices in San Antonio and Dallas, Texas. The Employer is engaged in the electrical construction business. Jacky Martin is the president of the Employer. Project manager Bruce Wilkins oversees most Bexar County jobs. In addition to Wilkins, the Employer currently employs 22 employees as journeyman, apprentice, and helper electricians in Bexar County, two of which are supervisors.<sup>1</sup>

At the time of the hearing, the Employer had three jobs under contract in Bexar County: Target T-176, Southwest Elementary School, and St. George Marionite Church. The Employer has one Bexar County job bid pending: Sun Valley Elementary School.

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<sup>1</sup> The parties stipulated that project manager Bud Wilkins and foremen Bruce Hastings and Albert Cortez are Section 2(11) supervisors because they can hire, fire, and discipline employees.

The Target job started in February 2002 and is scheduled for completion no later than July 15, 2004. Six employees staff the job. The Southwest Elementary job is scheduled to end no later than July 7, 2004. Sixteen employees staff the job. Joeris General Contractors is the general contractor. Three employees on the Southwest Elementary job were recently transferred from the Employer's Fort Worth location to help expedite its completion.

The record reflects that the Employer will staff the Church job at the end of June or first of July 2004. It anticipates employing three to four electricians for the job and predicts it will know the outcome of the Sun Valley Elementary bid within 30 days of the instant hearing. If awarded the Sun Valley Elementary job, the Employer expects to hire 16 electricians as early as mid to late July. As with the Southwest Elementary job, Joeris General Contractors is the general contractor.

Since February 2002, the Employer has employed between 3 and 24 employees on jobs in Bexar County. At the time of the instant representation hearing, the Employer employed 20 non-supervisory electricians, consisting of journeymen, apprentices, and helpers, in Bexar County. After the Employer completes the Target and Southwest Elementary jobs, it will have four employees working on the Church job. If the Employer is awarded the Sun Valley Elementary job, it will hire approximately 16 employees.

## **ANALYSIS**

The Employer does not dispute its status as a construction company, and the record reflects that it engages in the construction trade. Consequently, I find that an immediate election is warranted and deny the Employer's request to limit the unit to the three current Bexar County projects or abate the election. I also find that the three employees the Petitioner seeks to exclude from the election shall be allowed to vote if eligible under the *Steiny/Daniel* formula.

The Board has long recognized that employers in the construction industry experience fluctuations in the nature and duration of construction projects. Because of the fluctuations, construction workers experience intermittent employment, may be employed for short periods of time, and may work for several different employers during the course of a year. See *Steiny and Co.*, 308 NLRB at 1324.

To compensate for fluctuations without disenfranchising construction industry employees, the Board has developed a formula to determine voter eligibility. The formula provides that in the construction industry, “in addition to those eligible under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months proceeding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date.” *Steiny*, 308 NLRB at 1326. The formula excludes employees “who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.” *Id.* The Board applies this formula in all construction industry cases except where the employer clearly operates on a seasonal basis or the parties have agreed otherwise. *Steiny* at 1327-1328 and fn. 16. See also, *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999). Hence, by applying *Steiny/Daniel*, the Board is able to proceed to elections in spite of fluctuations in the construction industry.

Only in limited circumstances will the Board dismiss a construction industry petition based on a representative complement issue. The Board has dismissed petitions where the record reflected that the employer was imminently ceasing all work, therefore dissolving the unit sought. See *Davey McKee Corp.*, 308 NLRB 839 (1992); *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974). In *Davey McKee*, the Board found that an employer was imminently ceasing operations because all of its current jobs were soon ending and the evidence of pending job bids was uncertain. Likewise, in *M.B. Kahn*, the

Board also dismissed a petition because of evidence to show the employer was imminently ceasing operations.

On the instant facts, there is no indication the employer is imminently ceasing operations. In fact, the employer has two current jobs and one bid pending that will require 16 additional electricians to start as soon as mid-July 2004.

The present case is almost identical to *Fish Engineering & Construction Partners*, 308 NLRB 836 (1992), where the Board distinguished its facts from *Davey McKee* and found an immediate election to be warranted. Key to the Board's decision in *Fish Engineering* was that in addition to having four projects in the past year, two of which were active at the time of hearing, the employer had a pending bid for the same company with which it was currently under contract, a fact missing in *Davey McKee*. The pending job was scheduled to start approximately two months after the employer's active jobs ended. *Id.* at 836.

Similarly, on the instant facts, the Employer has worked two jobs within the past year, Target and Southwest Elementary. Both jobs are still active, although in the final phases. The Employer is contracted to start the Church job within the next month. As in *Fish Engineering*, the Employer has a bid pending on a job for the same general contractor with which it is currently under contract, the Southwest Elementary job. Moreover, the pending bid is expected to begin in two months. Because the Employer has two active jobs, one set to start in the next month, and one bid outstanding with the same general contractor, I find that the Employer is not imminently ceasing work in Bexar County and that proceeding to an election is justified.

On brief, the Employer argues that the *Steiny/Daniel* formula is ambiguous and that due to its fluctuating and diminishing workforce, the Board should dismiss the petition because the estimated number of employees at the time of an election will not be representative of its typical employee complement. The Employer relies on *Toto Industries (Atlanta)*, where the Board found that it was not desirable to "impose a

bargaining representative on a number of employees to be hired based on the vote of a few currently employed individuals.” 323 NLRB 645 (1997). *Toto Industries* is distinguishable from the instant facts because the employer was engaged in the manufacturing industry, not the construction industry. It is precisely to compensate for the fluctuations unique to the construction industry that the Board developed the *Steiny/Daniel* formula. Unless the parties expressly waive its application, the *Steiny/Daniel* formula applies to all construction cases.

Therefore, because the *Steiny/Daniel* formula applies to all construction industry cases, a lack of evidence that the employer is ceasing operations, and the Board’s decision in *Fish Engineering*, I find the formula appropriate in the instant case.

On brief, the Employer argues that if the Regional Director orders an election, he should either abate the election until the outcome of its Sun Valley Elementary bid is determined or restrict representation to its current three jobs in Bexar, County. The Employer’s arguments ignore the reality of the industry in which it operates and the application of *Steiny/Daniel*.

In fact, the Board seeks to begin construction industry elections as early as possible so as to “accommodate to the fluctuating nature and unpredictable duration of construction activities.” *Clement-Blythe Companies*, 182 NLRB 502 (1970). As stated above, the Board developed the *Steiny/Daniel* formula to compensate for fluctuations in the construction industry. Because I have determined that the *Steiny/Daniel* formula will be applied in this case, I find that neither a delay in the election nor a restriction of the bargaining unit to current jobs is warranted.

Turning to the Petitioner’s argument, it seeks to exclude three employees transferred by the Employer from Fort Worth, Texas to the Southwest Elementary job in Bexar County because they are temporary and do not share a community of interest with the Bexar County employees. The Petitioner’s sole basis for arguing that the three employees have no community of interest with the Bexar County employees is that the

Fort Worth employees receive a per diem during their stay in Bexar County and will likely return to Fort Worth to work for the Employer. This one difference is insufficient to destroy their community of interest with the other employees. See *L. Antonsanti, Inc.*, 100 NLRB 1485 (1952); *Battleboro Retreat*, 310 NLRB 615 (1993). The record reflects that the three Fort Worth electricians are working under the same supervision, same hourly wage rate, and same working conditions as the Bexar County employees. Thus, I find that the three employees sought to be excluded by the Petitioner are eligible to vote if they qualify under the *Steiny/Daniel* formula.

In summary, I find that an immediate election is warranted and reject the Employer's argument to limit the unit to the three current Bexar County projects or abate the election. I also find that the three employees the Petitioner seeks to exclude should be allowed to vote if eligible under the standards set out above, and that the unit be subject to voter eligibility per the *Steiny/Daniel* formula.

## **CONCLUSIONS AND FINDINGS**

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer, a Texas corporation, is engaged in the electrical construction business. During the past twelve months, the Employer purchased goods and services in excess of \$50,000 from sources outside the State of Texas. During the same period, the Employer has sold goods or services in excess of \$50,000 to entities outside the State of Texas. Based on the foregoing, I find the Employer is

engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.
4. The parties stipulated to the Petitioner's status as a labor organization.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All journeyman, apprentice, and helper electricians employed by the Employer in Bexar County, Texas.

**Excluded:** All guards, office and clerical employees, and supervisors as defined by the Act.

#### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Brotherhood of Electrical Workers, Local 60.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.



### **Voting Eligibility**

Eligible to vote in the election are 1) persons in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off; 2) persons in the bargaining unit who were employed by the Employer for 30 days or more within the 12 months preceding the eligibility date of the election (i.e., the last day of the payroll period immediately preceding the date of this Decision); and 3) persons in the bargaining unit who were employed by the Employer for at least some time in the 12 months preceding the eligibility date of the election, and for 45 days or more within the 24 months preceding the eligibility date of the election.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the San Antonio Resident Office, Travis Park Plaza Building, 711 Navarro Street, San Antonio, Texas 78205 on or before July 8, 2004. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on July 15, 2004. The request may **not** be filed by facsimile.

Dated: July 1, 2004

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Curtis A. Wells, Regional Director,  
National Labor Relations Board  
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